IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 502 of 1998

with

CRIMINAL APPEAL No 542 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

@

MOHAMMED ISMAIL @ HAJI ABDUL KADAR SHEIKH
Versus
STATE OF GUJARAT

---

Appearance:
1. Criminal Appeal No. 502 of 1998
MR MM TIRMIZI for appellant No. 1
Mr.B.Y.Mankad , learned Addl.P.P.
for Respondent No. 1
2. Criminal Appeal No. 542 of 1998
Mr.B.Y.Mankad, learned Addl.P.P.
for appellant No.1
NOTICE SERVED for Respondent No. 1

---

CORAM : MR.JUSTICE D.K.TRIVEDI

and

MR.JUSTICE H.H.MEHTA

Date of decision: 24/07/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE D.K.TRIVEDI)

1. The appellant accused has challenged the order of conviction and sentence recorded by the learned Addl. City Sessions Judge, Court No.11, Ahmedabad City on 3.4.98 in Sessions Case No.180/97 wherein the learned trial Judge has convicted the accused for the offence punishable under Section 304 Part II of I.P.C. and ordered to suffer R.I. for 7 years and a fine of Rs.1000/-- in default accused has to undergo R.I. for one month by preferring Criminal Appeal No.502/98. While Criminal Appeal being Criminal Appeal No.542/98 is filed by State of Gujarat challenging the order of acquittal of the accused under Section 302 of the I.P.C. passed by the learned trial Judge in the aforesaid Sessions case on 3.4.98.

2. As the judgment under challenge is common, wherein the accused has challenged the order of conviction and sentence while the State has challenged the order of acquittal passed by the learned trial Judge acquitting the accused from the offence under Sec.302 of the I.P.C., accordingly both the Appeals were notified for admission and as per order dated 21.12.98 notice was issued to the accused in jail and the notice of Appeal was duly served to the accused in jail. It is further found that when the said notice was received back, there is nothing to indicate that whether the accused has requested to represent through his own lawyer or he has requested for providing legal aid. Accordingly when the matter was before us, as per order dated 23.7.2002 we have directed the jail authority to produce accused Mohammed Ismail Alias Haji Abdul Kadar Sheikh before this court as the State has challenged the order of acquittal passed against the said accused. In view of the order of production of the accused, accused was brought by the jail authority before us and we have informed the accused that the State has challenged the order of acquittal and the notice in the said Appeal was duly served on him in the jail and we have also shown the notice, which was acknowledged by him by putting his signature, and on seeing the said notice he had identified his signature on the said notice and he has further confirmed that he has not made any request to the jail authority for engaging his private advocate or for providing legal assistance from the State. According to him, he has challenged the

order of conviction by filing Appeal through private advocate and he has further stated that Mr. Tirmizi, learned advocate, will represent him in the said Appeal and accordingly Mr. Tirmizi has also agreed that he will represent the accused in both the Appeals.

3. During hearing Mr. Tirmizi, learned advocate, has taken us through the paper book consisting of oral and documentary evidence recorded during the trial as well as the judgment under challenge. It is his contention that the learned trial Judge was not right in accepting the prosecution case and further that the learned trial Judge has failed to take into consideration the defence put forward by the accused. He next urged that the learned trial Judge has also committed error in relying upon the dying declaration of the deceased recorded by the Executive Magistrate, in view of the fact that deceased Madinaben had burn injuries to the extent of 95% and considering the extend of such burn injuries, Madinaben could not be in a position to narrate or give dying declaration before the Executive Magistrate and according to Mr. Tirmizi that relying upon such dying declaration, the learned trial Judge has committed error and the order passed by the learned trial Judge convicting the accused for the offence under Section 304 Part II of the I.P.C. deserves to be set aside.

4. On the other hand, Mr. Mankad, learned Addl.P.P. has vehemently urged that in view of the dying declaration of Madinaben recorded by the Executive Magistrate, the learned trial Judge was not right in acquitting the accused from the offence under Section 302 of the I.P.C. and according to him the order of acquittal of the accused from the offence under Section 302 of the I.P.C. deserves to be set aside and the accused is responsible for the said offence. Mr. Mankad has also while arguing before us taken us through the observations made by the learned trial Judge while acquitting the accused from the offence under Section 302 of the I.P.C. etc. It is his contention that as per the prosecution case the accused had on the previous day of the incident threatened Madinaben and Madinaben had approached the sister of the accused and she alongwith her sister in law had returned and went to the house and at that time accused had assaulted deceased Madinaben and dragged her in the kitchen and poured kerosene on her and ignited her with the result that Madinaben had sustained burn injuries and Madinaben was taken by her husband at the Hospital for treatment and during treatment she has succumbed to her injuries on 14.2.97. Mr. Mankad has vehemently urged while referring to the complaint filed

before the police in the earlier in point of time stating that Madinaben was being abused by the accused even on the previous day as well as on the day of incident and the complaint also highlighted about the motive for committing such offence. It is the contention of Mr. Mankad that as found from the evidence of the Executive Magistrate, who has recorded the dying declaration of the deceased in the Hospital, he had ascertained from the Doctor about the consciousness of the injured Madinaben and it is further found from the evidence of the Executive Magistrate that while recording such dying declaration he has taken all precautions by not keeping any relative or the police person nearby injured Madinaben and the dying declaration of Madinaben was recorded in question - answer form and Madinaben has in her dying declaration stated about the manner in which her husband had beaten her by dragging her in the kitchen and at the instance of the husband she has sustained burn injuries. According to Mr.Mankad, the learned trial Judge ought to have held that in view of the evidence led by the prosecution, the accused has committed offence punishable under Section 302 of the I.P.C.

5. To examine the contentions raised before us by Mr. Tirmizi and Mr. Mankad, learned Addl.P.P., it is necessary for us in brief to refer to the prosecution case as well as the defence put forward by the accused. It is an admitted fact that the accused and Madinaben had married to each other 5 years prior to the incident. It is also found from the evidence that Madinaben had three children out of the earlier marriage and after giving divorce to her husband, she married to the appellant accused Mohammed Ismail Alias Haji Abdul Kadar Sheikh. After her marriage with Mohammed Ismail they had three children and all the three children, Madinaben and her husband were staying together. The house in which they were residing, is belonging to deceased Madinaben. It is also found from the evidence that the marriage of Madinaben with accused was a love marriage. The incident in question had occurred on 8.2.97. Prior to the said date, namely, on 7.2.97 in the night at 11 '0' clock, deceased Madinaben had misplaced Rs.10/-- given by the accused and when said amount was demanded, she could not give the same. Accused had accordingly beaten Madinaben at night and the accused also gave threat to burn her. Accordingly on the next day morning i.e. on 8.2.97 at 9.0 A.M. she approached her sister in law Rashidaben to persuade her brother and thereafter Madinaben returned to her house with Rashidaben. At that time accused was present at the house and he assaulted Madinaben in the presence of Rashidaben. Rashidaben tried to intervene

but she was also beaten. Thereafter, the accused pushed Madinaben inside the house and poured kerosene on her and ignited match stick. Madinaben cried. Rashidaben, her sister in law, tried to wrap Rajai to save her and 4 to 5 persons of Maholla also came on the spot. Madinaben fell unconscious. Thereafter, she was removed to Civil Hospital, Ahmedabad for treatment. Doctor has started treatment. From the Hospital a Vardhi was sent to Rakhial Police Station and on the basis of Vardhi, Police recorded the complaint of Madinaben and the offence was registered. Investigating Agency has issued yadi to the Executive Magistrate for recording the dying declaration and accordingly the Executive Magistrate has on the basis of the Yadi sent to him, reached at the Hospital. He contacted the Medical Officer to find out whether Madinaben is in a position to give dying declaration and on getting Certificate from Medical Officer that Madinaben is in a fit condition to giver her dying declaration, he had recorded the dying declaration after following the procedure for recording such dying declaration. Prior to recording of the dying declaration by the Executive Magistrate, the complaint of Madinaben was recorded by the Police and on the said complaint, the investigation had proceeded further. The accused was also arrested and he was having injury, as according to the accused at the time of the incident when he tried to save her, deceased Madinaben had given bite. The arrest of the accused was affected. Police has also recorded the statements of witnesses. Panchanama of the scene of offence was also drawn by securing the presence of Panchas. The cloth worn by the accused which were found in the room were also seized under Panchanama. The muddamal, which was recovered, was sent to Forensic Science Laboratory for investigation. Madinaben died in the Hospital during treatment on 14.2.97. On getting the information, the inquest panchanama was draw and on completion of the investigation, the charge sheet was filed against the accused for the offences punishable under Sections 307 and 498-A of the I.P.C. We may also observe that as Madinaben had died on 14.2.97, the offence under Section 302 of the I.P.C. was added.

6. The prosecution had in all examined 12 witnesses, including the persons from the Investigating Agency and the Doctor attached to the Hospital as well as the Panch witnesses. P.W.2 Rashidaben, real sister of the accused, has not supported the prosecution case and at the request of the learned P.P. she was treated as hostile.

7. Liyakatali - P.W.7 examined by the prosecution has deposed that he is residing behind the Monogram Mill

in Rangwala-ni Chali. He knows Madinaben as well as her husband - the present appellant. He has also identified the accused in the court. He deposed that accused had frequent quarrel with his wife Madinaben and accused had some ill relation with one Mehrunnissa, who was residing nearby the house of accused and on that count, the quarrel used to take place between them. On the day of incident, he was at his shop. His shop is situated about 20 ft. away from the house of accused. At that time it was 10 '0'clock. Even at that time there was a quarrel between the appellant and Madinaben. She was crying. People were shouting "Fire - Fire". He reached at the house of Madinaben and he saw Madinaben in burnt condition.

In the cross-examination the witness has denied that he has no relation with father of deceased Madinaben and he is residing in Rangwala-ni Chali since 1970. He denied the suggestion that accused and Madinaben were staying with six children and further denied that there was quarrel between the deceased and accused on that count. He denied that because of the cry he has not gone to the house of Madinaben. He denied that he has no personal knowledge about the incident and the witness has also denied that there was no quarrel with him by the accused. He denied the suggestion that there was no ill relation between accused and Mehrunnissa and he is deposing falsely.

8. We are not referring to the evidence of real sister of appellant Rashidaben. However, at this juncture it is necessary for us to refer to her version before the court with regard to the incident. Rashiaben - P.W.2 had deposed that the deceased Madinaben had married to her brother Mohammed Ismail, who is accused in the present case. As she has not supported the prosecution by stating that the police has not made any inquiry in respect of the incident, she was treated as hostile witness and in the cross examination by the learned P.P., though admitted that the statement was recorded by the police, she has not supported such version, which she has given before the police. Though the witness has in term stated in her statement before the police and before the court,she has denied the contents of her statement. She had stated that on the day of incident at 9.0 A.M. Madinaben had come to her house and she has informed the story to her as well as to her husband that her husband has assaulted her on the previous day at about 11 P.M. There was some dispute on account of money and her husband had given threat to burn and accordingly she approached them to advice her

husband. She alongwith Madinaben had come in rickshaw and at that time her brother had, in her presence, assaulted the deceased, during which she intervened and she was also beaten by her brother. Thereafter,her brother took Madinaben inside by giving force and she was asked to stand outside the house. There was cry and when she went inside the house, she saw Madinaben was burning. She accordingly put Rajai. She had also denied that she is deposing falsely to help her brother. As observed earlier, P.W.2, who is the real sister of accused, has not supported the prosecution.

9. As found from the evidence Madinaben was taken by her husband to Civil Hospital. Medical case papers show that on 8.2.97 at 11 A.M. she was taken to Civil Hospital and the history was conveyed by the appellant to the Doctor. History given by the appellant shows that in their house by pouring kerosene Madinaben at about 10.30 A.M. sustained burn injury. The medical case papers of Madinaben are at Exh.38. It is further found from the medical case papers that she was treated in the Civil Hospital and she died on 14.2.97 at night. When she reached at the Hospital Dr. Joshi attached to the Civil Hospital had informed the Constable attached to the Hospital and the Vardhi was given, which is at Exh.27. As found from the Vardhi Exh.27, the police was informed that as per the instruction given by Dr.Joshi from the Civil Hospital, one lady named Madinaben aged 30 years on 8.2.97 at about 10.30 A.M. for some reason in the house of her husband by pouring kerosene has sustained burn injury and brought in the Civil Hospital at 11 A.M. by her husband and the patient Madinaben has been referred to Burns Ward E/5 and to do needful in the matter.

10. P.W.9 Natvarlal Rathod has deposed that he was attached to Rakhial Police Statio as 2nd P.I. and when he was on duty on 8.2.97 P.S.O. Balwantbhai had given Vardhi and on the strength of the said Vardhi he had gone to Civil Hospital where he met Madinaben. She was found in burnt condition and she was completely conscious and she was talking. Question was put to Madinaben and accordingly he inquired with Madinaben. Madinaben gave complaint, which he has recorded. After recording the complaint, thumb impression of Madinaben was taken and he has also put the signature in the said complaint. The complaint of Madinaben was written by his Writer Constable and P.W.9 Rathod had also identified the hand writing of his Writer. The complaint filed by Madinaben was shown to the witness, which is at Exh.23. On seeing the said complaint Exh.23,he identified that the thumb impression was of Madinaben, which was put in his

presence and he has also signed the said complaint. It is found from his deposition that he issued Yadi to the Executive Magistrate for recording the dying declaration of Madinaben. The witness has also while referring to the said yadi also identified the hand writing of Patel and also signature on the said Yadi of Patel. The Yadi was written by Patel in his presence and the contents thereof are also found to be true. Thereafter, from the Civil Hospital he went to the Police Station and he has submitted report to the P.S.O. for registering the offence. The report was prepared by him and also signed by him and the contents in the report was also found to be correct, which is also proved and the said report is at Exh.25. On the strength of the report submitted by him, the offence was registered at Rakhial Police Station and further investigation of the case was handed over to Desai, Senior Police Inspector.

In cross examination it is found that whenever any Message is received in the police station, entry is always made in the Vardhi Book and further admitted that Vardhi Book is always maintained and kept by P.S.O. He has also brought the Vardhi Book in the court and in respect of the incident, Vardhi was found and the same was received at 11.15 A.M. It is further found from the cross examination that on the strength of the Vardhi he reached the Civil Hospital at 11.35 and went to the Burns Ward and approached the nurse. When he reached near Madinaben on the Burns Ward nearby her husband, Aisabibi and one person was present. He did not inquire with the accused about the burn injuries found on Madinaben. He has started inquiring with Madinaben. He has admitted that Madinaben had sustained burn injury. However, she was in a position to speak. He denied that Madinaben has not stated anything in respect of the incident and further denied that no complaint was given by Madinaben. He has further denied that the complaint was given by her brother, who was present at that time. As found from the evidence of P.W.9 Rathod, who is 2nd P.I. attached to Rakhial Police Station, on getting the Vardhi from the Hospital he immediately rushed to the Civil Hospital and inquired about Madinaben and Madinaben was found in the Burns Ward and he recorded the complaint of Madinaben and Madinaben also put her thumb mark on the said complaint and he has also signed the said complaint as the complaint was given before him.

11. The complaint of Madinaben is at Exh.23, wherein Madinaben has in detail given background about her family members and also her marriage to the accused, which has taken place before 5 years. She has disclosed that from

her marriage with accused, they have one son and two daughters. Elder daughter is Salma aged 13, son Sadiq aged 9 and daughter Sabana 7 years and all the three children are staying with her mother. After taking divorce with the earlier husband, she got married to Mohammed Ismail - the present accused and from their marriage she delivered two daughters and one son, namely, Sahnoor aged 5, Nenoor aged 3 and youngest son aged 1 year. After her marriage, all the three children with her husband were staying in the house belonging to her. Her husband was not doing any work and her husband was selling liquor and he also used to beat her. Her husband has also developed illicit relation with Mehrunnissa, the daughter of Vahadbhai, who was residing nearby their house and he was intent to marry her and for that accused was giving ill treatment to her. While referring to the incident of previous day i.e. on 7.2.97,she described that her husband came at about 11 '0' clock at night and the amount of Rs.10/-- given by her husband were not found and her husband has demanded back the said money for which she has not paid and accordingly her husband gave kick and fist blows. She remained in the house and her husband had also given threat that "I will kill you by giving burns". Accordingly on the next day morning i.e. on 8.2.97 due to threat given by her husband, she approached at the house of Rashidaben at 9 A.M. and requested her to advice her brother. She has gone to the house of Rashidaben situated at Millatnagar Shah Alam. At that time Rashidaben as well as her husband Gullu were present. Rashidaben had accompanied her and they had gone to the house in rickshaw. At that time her husband was present in the house. Her husband has in presence of his sister has assaulted her, during which Rashidaben had intervened. Her husband has assaulted her and dragged her inside the house. Her husband has taken out kerosene from the Kerba and poured the same on her and ignited the match stick, because of which she cried. Rashidaben has came to help and also threw Rajai. Other persons from the vicinity had also gathered. This incident had occurred at about 10 or 10.15 A.M. Due to burn injury, she became unconscious. On the previous day, because of the fight with her husband, she had also given bite on the left hand palm. After sustaining burn injuries, the other sister of accused Ashabibi and her husband had taken her to Civil Hospital. In the complaint she has disclosed that the incident took place at about 10.10 A.M. because of the ill relation with Mehrunnissa, who was residing nearby her house and accused intended to marry her, for which accused was giving ill treatment and poured kerosene on her and she had sustained injury and her husband has committed attempt to murder. The

complaint Exh.23 is recorded in the first in point of time when she was taken to the Civil Hospital by her husband and his sister.

12. We have already discussed the evidence of P.W.9 Rathod, who has recorded the complaint of Madinaben on receiving the Vardhi from the Hospital and he rushed at the Hospital at 11.15 A.M. So complaint was given by Madinaben at the earliest in point of time and it was recorded by P.W.9 Rathod. Motive suggested in the complaint is the ill relation of the husband with Mehrunnissa, who was residing nearby their house and even the accused was assaulting and giving ill treatment as the accused intended to marry Mehrunnissa and further highlighted the previous day incident, which has occurred on 7.2.97 she had also stated in the complaint that because of the incident which has occurred on the previous day she had given bite on the left hand palm of her husband and on the next day morning at 9 A.M. she had approached Rashidaben, the sister of the accused and when they reached the house, accused had also assaulted her and when Rashidaben had tried to rescue her, she was also beaten by the accused and the accused had dragged her inside the house and poured kerosene and she has sustained injuries.

13. Exh.24 is the Yadi issued by the Investigating Agency in favour of Executive magistrate, Ahmedabad. In the Yadi the Executive Magistrate was informed that one patient Madinaben, wife of Mohammed Ismail, aged 30 years, residing in Rangvala-ni Chali for some reason had poured kerosene and sustained injury and she was brought in the Civil Hospital in Burns Ward E/5 for treatment and the Executive Magistrate was requested to record her dying declaration immediately. Exh.24 also shows that the Yadi was taken to the Executive Magistrate by Constable Mansingh, Buckle No.4145 and the said yadi was received by Executive Magistrate at 1.30 P.M. and immediately at 1.35 P.M. the Executive Magistrate had proceeded to record the dying declaration of Madinaben while going in a Jeep Vehicle bearing No. GTM 4674. Exh.25 is the report of the Police Inspector. The offence has taken place on 8.2.97 between 10 to 10.15 A.M. and the offence was disclosed on the very day at 12.30 P.M. The report shows that in view of the complaint given by Madinaben, the offence was registered for the offences punishable under Sections 307 and 498 of I.P.C. and entry was made in the Station Diary under Sec.157 of Cr.P.C. Accordingly P.W.9 Rathod, on receiving the Yadi from the Constable attached to the Civil Hospital, proceeded to Civil Hospital and when he

reached at the Civil Hospital, he has recorded complaint of Madinaben and the complaint was written by his Writer and Madinaben has put her thumb impression and P.W.9 had also put his signature.

14. S.V.Dixit P.W.1 examined by the prosecution has deposed that he is working as an Executive Magistrate since 1996 in the Metropolitan area in Ahmedabad and one of the duty is also to record the dying declarations. On 8.2.97 at 1.30 P.M. one Yadi from the Rakhial Police Station was received wherein a request was made for recording dying declaration. The yadi was brought by a person who came in Police Mobile Van. On receiving the said Yadi, he has also put his endorsement in his own hand writing and also signed. On the strength of the said Yadi he had proceeded to Civil Hospital and had gone to E/5 Ward for recording the dying declaration. First he approached the Doctor and he inquired from the Doctor whether the person, whose dying declaration was to be recorded, is conscious or not and he has also recorded the opinion from the Doctor. The Doctor had given his opinion in his presence and as per the opinion given by the Doctor, the patient is conscious and in a position to give dying declaration. Thereafter,the Constable took him to Madinaben and the Constable had left the Ward. When he approached Madinaben at that time Madinaben was conscious and was speaking and he has started recording of the dying declaration. He inquired the name, address and also inquired in respect of the incident and inquired that in what manner the incident had occurred and Madinaben had given her dying declaration, which he has noted down in his own hand writing. He has noted down the dying declaration as per the say of Madinaben. After recording of the dying declaration, the same was read over to Madinaben and thereafter Madinaben has put her thumb impression in his presence. Thereafter, he has also put his endorsement. Thereafter, he handed over one copy of the dying declaration to the Police and signature thereof was taken. P.W.1 Dixit has proved the dying declaration of Madinaben, which was recorded by him as per the say of Madinaben, which is at Exh.9.

In cross examination he has stated that even prior to the recording of the dying declaration, he had recorded many dying declarations of others. He denied that for recording of the dying declaration alongwith him any person from the staff had come. He has also denied that at the time when he had recorded the dying declaration of Madinaben, at that time many relatives of Madinaben were present. He further deposed that when he had gone to Ward No.E/5, at that time Madinaben was not

in the said Ward, but she was in the dressing room, which was nearby and Madinaben was alone in the room and no other persons were present. He has denied that at the time he had gone and approached Madinaben in her room her brother and sisters were also present. He has denied that at that time relatives of Madinaben were also present. When he saw Madinaben, he saw burn injury to the extent of 75%. He denied that at the time when he had recorded the dying declaration and when he put question, Madinaben was not in a position to give such dying declaration. According to him when he had gone to the room of Madinaben, Doctor had accompanied. Doctor has also inquired with Madinaben and Madinaben was conscious and he has also talked with Madinaben. Doctor has asked question to Madinaben when he was present. He has denied that as and when questions were put to her she has not replied and gave answer. He denied that he has not recorded the dying declaration of Madinaben. He denied that he has not recorded the dying declaration of Madinaben in the dressing room. According to him he had recorded the dying declaration near the table of Nurse and further he has recorded the dying declaration of Madinaben in the dressing room and Madinaben has also put her thumb mark. He had denied that the same was not read over to Madinaben. After obtaining the thumb impression on the dying declaration, he had not contacted the Doctor.

15. Exh.9 is the dying declaration of Madinaben. As found from the document Exh.9 recording of dying declaration was started at 2.0 P.M. at Civil Hospital on 8.2.97. Madinaben, while disclosing her name, has disclosed her name as Madinaben and her husband's name as Mohammed Ismail.She was doing household work. She was uneducated . Her marriage has taken place before 6 years. The incident has occurred in the house itself. On 8.2.97 at 10.0 A.M. in the house itself altercation has taken place in respect of demand of Rs.10/-- by her husband. Altercations had also taken place on many occasions. At that time in the house three children, Rashidaben - the sister of her husband and wife of Gullu were present. Rashidaben has tried to save her when she has got burns. Her husband got excited and poured kerosene on her and ignited match stick. At that time she had worn green colour polyester cloth which were completely burnt. At that time Rashidaben had rescued her and thrown Rajai. She has not committed any attempt to commit suicide. The burns were caused by her husband. The fact of pouring kerosene was true. Her husband off and on had quarrel and ill treated her. She has sustained burn injuries on her chest, on the left and

right leg. She had two sons and four daughters. She married second time with her husband. Whatever she has stated is true. The same was read over to her and the same were correct and for that she has put her thumb impression. There is also a right hand thumb impression of Madinaben as well as signature of Executive Magistrate dated 8.2.97. The endorsement also shows that at the time of recording dying declaration, no relative nor police were present and the patient was fully conscious and after ascertaining from the Doctor, the same was recorded at 2 P.M.

16. P.W.1 Dixit has recorded the dying declaration of deceased Madinaben, after she gave complaint to the police. In the dying declaration she has narrated the incident, which has occurred on 8.2.97 at about 10 A.M. when she was there on her house and she has also narrated how her husband has poured kerosene on her and ignited the match stick, because of which she has sustained burn injuries. The dying declaration also shows that the sister of appellant accused Rashidaben was also present and she has also tried to rescue her by throwing Rajai. An answer was given by deceased Madinaben in her dying declaration that she has not committed any suicide and she attributed that her husband has poured kerosene and ignited, with the result that she has sustained burn injuries.

17. At this juncture it is necessary for us to refer to the evidence of P.W.11 Kantibhai Patel. As found from his evidence, he has taken over the investigation of the case from Desai. On 15.2.97, as Madinaben has died during treatment in Civil Hospital, P.S.I. Zala, who has recorded the inquest report, has brought the papers, which he has kept alongwith the papers of investigation. He has also taken visit on 16.2.97 at the place of incident and he has recorded the further statement of Shahedabibi and others. Thereafter, the muddamal were sent to Forensic Science Laboratory under Yadi. He has proved the Yadi, which was sent to F.S.L. at Exh.32. After obtaining the medical certificate of accused and deceased Madinaben, which are at Exh.14 and the Post mortem report of Madinaben, which is at Exh.21, he filed charge-sheet against the accused before the court.

In the cross examination, he has admitted that at the time when he had visited the scene of offence on 16.2.97 alongwith him, his Writer was present. He has also denied that it is not correct to say that there was no evidence against the accused.

18. Dr. Joshi P.W.4 had deposed that in the year 1996 he was attached as a Medical Officer with the Civil Hospital. On 8.2.97 when he was on duty a patient, namely, Madinaben was brought before him for treatment. Alongwith her, her husband Mohammed Ismail was present.They have not come with Police yadi. He had informed police, namely, the Police having buckle No.6462. He examined Madinaben. While examining her for the injury, the history was given by her husband. As fond from the examination of Madinaben, Madinaben had 3rd degree burns almost on all part of the body, except on the leg and on the back portion and the burn injuries were to the extent of 80%. When he examined the patient, there was a smell of kerosene. After treating her, the patient was referred for treatment to Dr. Kantharia's Unit. He has also issued certificate showing the injury found on Madinaben, which is at Exh.14. It is further found that the medical case papers of Madinaben were also brought in the Court.

In the cross examination he had deposed that he had inquired with Madinaben. However, she has not replied. He has further deposed that he had inquired by going close to Madinaben. The witness has admitted that the patient was not giving any reply. However, the patient was conscious and the patient was also having a movement of her organs. However, for some reason Madinaben was not disclosing. He has noted down the injuries found on Madinaben. He had denied that the injury Certificate Exh.14 was prepared on the strength of the medical case papers.

19. Exh.14 Medical Certificate of Madinaben shows that she was examined by Medical Officer on 8.2.97 at 11 A.M. The patient was admitted in the Hospital on 8.2.97 under Dr. Kantharia's Unit. The history was given by Mohammed Ismail (husband). It is written in Gujarati that "POTANA GHAR MA KEROSENE CHHATI-NE AJE LAGBHAG 10.30 WAGE DHAZI GAYA". On examination, it was found that there was 1st, 2nd and 3rd degree burns almost all over the body except part of right arm, both feet and part of back face and neck 9% front of chest and abdomen 18% back 9% right upper limb 5% left upper limb 9% right lower limb 15% left lower limb 15%. There was also smell of kerosene and the patient was conscious, but does not reply. As found from the document Exh.14, medical certificate, the history was given by Mohammed Ismail, husband of Madinaben and further that the patient was conscious.

20. Dr. Hasumatiben P.W.8 had deposed that she is

attached as a Medical Officer since last 8 years in Civil Hospital. On 15.2.97 a dead body of Madinaben was brought at 11.05 A.M. by Police Constable of Rakhial Police Station alongwith inquest panchanama for post mortem. Dr.Modi has started the post mortem of dead body of Madinaben at 12 noon and completed the same at 1.0 P.M. There was 1st to 3rd degree intacted burns over face, neck, middle part of forearm, chest, abdomen left upper limb, right upper arm on middle part and hands. Cause of death was as a result of burn of 95%. The post mortem report is proved by Dr. Hasumatiben P.W.8, which is at Exh.21. The post mortem report was signed by her as well as Dr. Modi. She identified the signature of Dr. Modi.

In the cross examination Dr.Hasumatiben has denied that such injury is possible if a lady is cooking and due to flame from the stove such injury is possible. She has also denied that such injury is also possible when the cloth got burnt and she has also denied that if any person had poured kerosene and ignited match stick then such injury is possible. The witness was recalled in view of the answer given by Dr. Hasumatiben that if kerosene is powered on any person and ignited the same by match stick, the injury sustained by Madinaben is not possible. When the witness was recalled, the earlier answer given by her was clarified and she has stated that such injury is possible if upon a person kerosene is powered and ignited by match stick. Dr. Hasumatiben has in term deposed that the injuries found on Madinaben are sufficient in the ordinary course of nature to cause death.

21. Dr.Gupta, P.W.12 has deposed that on 8.2.97 he was working as a Resident Surgeon in the Civil Hospital and he was attached to Dr. Kantharia's Unit. On that day he treated Madinaben, who was referred to their Unit by C.M.O. Madinaben had burn injuries. While referring to the medical case papers of Madinaben, he deposed that Madinaben was fully conscious and oriented when he examined her and Madinaben was in a position to speak and Madinaben was in a position to understand the question put to her. He tried to find out history from Madinaben and at that time Madinaben had told him that she was burnt by Kerosene, which was poured on her by her husband. on the case papers at page 2 he has written down the history in his own writing. While referring to the medical case papers at page Nos.1 to 6 it is in his own hand writing. Said medical case papers are at Exh.38. The Police had come to him to inquire whether the patient is conscious and he made an endorsement below

the Yadi Exh.24, which is in his own hand writing. By making endorsement he has mentioned the date and time. When Madinaben was brought, her general condition was not good and the same was explained to her relatives and on seeing the medical case papers, he has stated that Madinaben had died on 14.2.97.

In the cross examination the Doctor has in term admitted that when Madinaben was brought to him, her relative had narrated the history to him. He can not say that when Madinaben was brought to him only her husband accompanied him. He could not even remember whether any other persons were accompanying when Madinaben was brought to the Hospital. He denied the suggestion that Madinaben has not narrated the history. He denied that Madinaben has not narrated that kerosene was poured on her. As found from the medical case papers, he deposed that Madinaben was brought to the Hospital at about 11.20 in the morning. He has admitted that some writing in Exh.38 are in black ink and some are in blue ink and further admitted that when he noted down the history, Madinaben was already under treatment in the form of I.V. Fluid only.

22. Mansurkhan - P.W.5, who was a Panch, was examined by the prosecution. He deposed that he is residing opposite Rangwala-ni Chali. On 8.2.97 he was called by the Police as a panch. He was called at Rakhial Police Station. No other persons were called.The police has brought cloth of Madinaben and accordingly he was called. He has seen those clothes i.e. one yellow colour sweater and one Surval and jumper. Those cloths were seized by the police.The witness has also identified the said Article No.7 in the court and the witness has also proved Panchanama Exh.17. Panchanama Exh.17 is drawn on 8.2.97, wherein Mansurkhan - P.W.5 was one of the Panchas and another Panch was Liyakatali.

In cross examination he has denied that when he reached at the police station at that time police has taken his signature in a written document. He has admitted that there are cases pending against him and against the accused and Ayubkhan. These cases are of assault. He has denied that the police has not found the cloth in his presence. He has denied that the police has not seized the cloth in his presence. He denied that the brother of Madinaben has taken him to the Police station. He denied that the accused is a leader in Rakhial area and he has no knowledge that the accused during Moharram used to ride on horse during procession and denied that he deposed falsely against the accused.

23. Panch Jagdishbhai P.W.6 has not supported the prosecution who acted as a Panch for preparing the panchanama of the scene of offence. Request of the learned P.P. for treating him as hostile was granted and he denied that he acted as a panch on 8.2.97 at 16.40 hours at Rangwala-ni Chali and the place was shown by the accused. At that time, the F.S.L. Officer Sharma was present and from that place some cotton with kerosene was taken and the burnt cloth and match box and the tin of kerosene was seized.

24 The scene of offence Panchanama is at Exh.17. The same was drawn on 8.2.97 and started at 20 hours and completed at 21.30 hours. The place of incident was shown by accused and under this Panchanama police had attached the articles and articles smelling of kerosene were also seized.

25. Abdul Rashid P.W.3 is the brother of deceased Madinaben. He deposed that marriage of Madinaben first took place with one Mohammed and after taking divorce, Madinaben has married to accused in Court. Her marriage has taken place prior to 5 years of the incident. After her marriage with accused, the marriage had gone well for about four months and, thereafter, as the appellant accused was not doing any work, there was some dispute amongst them and accused used to beat her and when they go to pacify, then the accused used to beat more. His sister Madinaben was looking after the business of ironing. The incident in question has occurred on 8.2.97. Prior thereto 2 to 3 days, there were some dispute. On the date of incident at about 10.30 A.M. his brother Mohammed Ismail came with rickshaw and informed him that accused has beaten their sister severally and, thereafter, she was burnt. Thereafter, he had gone to Civil Hospital. There another brother Alimohammed informed that Madinaben is inside and treatment has been started and police is doing their work. After the Police had completed their work, they were permitted to see Madinaben and when they approached Madinaben, Madinaben has talked to them. She was found in burnt condition. She was not in a position to speak properly. She has informed that "I am now going. This is my last time. Accused has beaten her and burnt her. I am giving my child." The police has recorded his statement.

In cross examination he has admitted that the first marriage of Madinaben was with his consent and from first marriage they have three children. He has admitted

that first husband of Madinaben is alive. He has admitted that marriage of the accused with Madinaben was not liked by him. He has denied that because of love affair, Madinaben has married accused. He has denied that because of the marriage by his sister with the accused he has not got relation. He has admitted that out of marriage with accused, they have three children. In 1995 due to some dispute, Madinaben has filed complaint in court. He has denied that accused and Madinaben were saying peacefully. He denied that the accused was not giving ill treatment to Madinaben and he has not filed complaint against the accused. He denied that Madinaben was staying with all the six children with accused. He has denied that in the house where Madinaben and her husband were staying, the said house was purchased by accused in the name of his sister Madinaben. He denied that when he reached on the day of incident at Civil Hospital, at that time Madinaben was found dead. He has denied that in the Hospital there was no talk between him and his sister. He has admitted that in his police statement he has not stated that when he has gone to Civil Hospital, where his brother met and he informed him that Madinaben has been kept inside lying and the treatment is yet not started and the Police will do their work and, thereafter, that after finishing the work by the Police, Police has permitted to meet Madinaben and thereafter they have a talk with Madinaben. He has further admitted in his police statement that he has not stated in his police statement that Madinaben has stated that "I am leaving. This is my last time. I am handing over my children." He denied that his relation with the accused was good. He has also denied that through Madinaben he used to demand money from the accused and during the absence of accused, he visited the house of his sister and took money from Madinaben. He has denied that Madinaben has not told him that accused has beaten her and burnt her. He denied that because of no relation with accused, he is deposing falsely against the accused.

26. The learned trial Judge has while appreciating of the evidence observed that for establishing the case against the accused for the offence under Sec.302 of the I.P.C. prosecution is required to establish:-

(1) quite objectively that bodily injury is present,

(2) the nature of the injury must be proved.

(3) there was an intention to inflict that particular bodily injury and it was not accidental or unintentional or that some other kind of injury

was intended.

The learned trial Judge has also further observed that prosecution is also required to prove that the accused has had the intention of causing injury and had the knowledge that the injury which he intended to inflict was likely to cause death and the act is imminently dangerous and in all probabilities, it will cause death or bodily injury as is likely to cause death. The learned trial Judge has observed that the prosecution must establish that the accused had an intention for inflicting particular bodily injury which would result into death and with that knowledge, the injury was inflicted. The learned trial Judge has while examining the evidence before him observed that according to the prosecution case there was a love affair with his neighbour Mehrunnissa and he wanted to marry her and, therefore, he used to inflict physical cruelty to deceased Madinaben. The prosecution has not proved the case of the prosecution that accused wanted to marry his neighbour Mehrunnissa and therefore, he used to inflict mental and physical cruelty to drive deceased Madinaben to commit suicide and the court was of the view that there was no such conduct on the part of accused to drive Madinaben to commit suicide. The learned trial Judge was also of the opinion that his conduct was not such conduct to cause grave injury or danger to life, limb or health of deceased Madinaben. The learned trial Judge has in term accepted the evidence of the prosecution witnesses with regard to the dying declaration of the deceased Madinaben Exh.9. wherein Madinaben has while describing the incident has narrated the manner in which the accused has acted while pouring kerosene and by igniting her and she has sustained burn injuries. As per the prosecution case the altercation with accused and the deceased Madinaben was in respect of demand of Rs.10/-- and the accused suddenly got angry and poured kerosene over her and accordingly the learned trial Judge was of the view that there was no intention on the part of accused to commit murder of Madinaben prior to altercation between them, as according to Madinaben in her dying declaration that accused suddenly got angry and the learned trial Judge has considered that the act committed by accused was in the heat of passion and on the spur of moment and the learned trial Judge was of the view that accused has no intention to commit murder of Madinaben. The learned trial Judge has also considered the fact that Madinaben was taken by the husband to Hospital for treatment. Considering these aspects, the learned trial Judge was of the view if the accused has intention to commit murder of Madinaben, then accused would not have taken Madinaben to

Hospital for treatment and the learned trial Judge was of the view that it cannot be said that accused had intention to inflict such bodily injury, which would result into death. The learned trial Judge had accordingly held that the prosecution has failed to prove beyond reasonable doubt that the accused has committed the offence punishable under Sec.302 of I.P.C. However, the learned trial Judge was of the view that in view of the evidence, the prosecution has established that accused has committed offence under Section 304 Part II of the I.P.C. as the accused had done the act with the knowledge that such act is likely to cause death, but without any intention to cause such death.

27. Mr. Tirmizi, learned advocate, appearing for the appellant accused has contended that from the dying declaration and other evidence led by the prosecution, it is not established that the accused has committed any offence as according to the defence the accused was not present at the house and he was called when he was away from the house and on getting information he immediately rushed to the Hospital and taken Madinaben for treatment by admitting her in the Hospital. It is his contention that looking to the prosecution case itself, the prosecution has not established anything for which one can say that the prosecution has proved the case that at the hands of appellant accused he was giving cruelty to deceased Madinaben and further it is the prosecution case that the marriage of the appellant accused with Madinaben was a love marriage.

28. As observed earlier, so far as the burn injuries sustained by Madinaben are concerned, the prosecution has established that she had a burn injury on the day when she was at her residence and in the complaint, which was filed immediately, she has in term narrated about the treatment that has been given to her by her husband and the incident which has occurred on the previous day,during which she was threatened by the husband to kill her by giving burn injuries. It is true that a real sister of the accused Rashidaben had not supported the prosecution case and she has turned hostile to the prosecution. However, as found from the complaint, deceased Madinaben had in term in her complaint has stated about the incident which has occurred on the previous night for which she is required to visit house of Rashidaben in the morning at 9 '0' clock and she requested her to come to her house and necessary advice be given to her husband, namely, the brother of Rashidaben and Rashidaben had accompanied Madinaben in a rickshaw and when they reached at their house, accused

had assaulted Madinaben and when Rashidaben - the sister of accused has intervened, she was also beaten and the accused has dragged Madinaben inside the house where the accused has poured kerosene on her and ignited with the match stick with the result that she sustained burn injuries and Rashidaben also tried to rescue her by throwing Rajai.

29. So far as the medical evidence is concerned, Madinaben was conscious and she was in a position to speak. Dying declaration recorded by Executive Magistrate is later in point of time and even at that time as per the medical opinion, Madinaben was conscious and she was in a position to speak and Madinaben has given her dying declaration, which was recorded by P.W.1 and after recording and explaining the literature to injured Madinaben, her thumb impression was taken. It is also to be noted that the appellant - accused and Madinaben were staying together with their children. It is only on the day of incident she had approached Rashidaben - the sister of accused by disclosing the incident which has occurred on the previous night, for which she had sought assistance of Rashidaben, sister of accused, and accordingly Rashidaben and deceased had come in a rickshaw, where the incident of pouring kerosene and giving burn injury had happened.

30. On considering the evidence as a whole, though Rashidaben has not supported the prosecution,but the prosecution has clearly established its case by leading evidence in the form of dying declaration of deceased Madinaben and by recording of such dying declaration by Executive Magistrate. We may also observe at this juncture that Madinaben was taken by the appellant husband in the Hospital and the husband has narrated the history and while disclosing the history, which is found from the medical case papers Exh.38, which was recorded by Doctor, the appellant accused Mohammed Ismail has stated that "POTANA GHAR MA KEROSENE CHHATI-NE AJE LAGBHAG 10.30 WAGE DHAZI GAYA". P.W.4 Dr.Joshi in term had deposed that Madinaben was brought by her husband and without Police yadi and it is only thereafter Dr. Joshi has informed the police Constable attached to the Hospital and from there the Police person has issued Yadi to the Rakhial Police Station and P.W.9, Second P.I. as per Vardhi Exh.23 had proceeded towards Civil Hospital and he contacted Doctor and he has inquired with patient and Madinaben was found in a burnt condition. He has recorded the complaint of Madinaben immediately. Complaint Exh.23 is also proved. The medical evidence also suggest that at the relevant time Madinaben was

conscious and was in a position to speak. We may also observe that Madinaben was alive till 14.2.97 and from 8.2.97, on the day when she has sustained burn injury, she was being treated in the Hospital till she died at night on 14.2.97. F.I.R. and the dying declaration were recorded on the very day and in first point of time, the F.I.R was given by Madinaben wherein she has disclosed the manner in which the accused has acted on the previous day as well as highlighted the motive for committing such offence. It is true that the prosecution has not established the case in respect of the motive that the accused has intended to marry a neighbour Mehrunnissa. We fail to understand the reasoning given by the learned trial Judge while acquitting the accused for the offence under Sec.302 of the I.P.C. As discussed earlier, the learned trial Judge has considered that as found from the dying declaration, the accused has got suddenly angry and the offence was committed and the offence was committed in heat of passion and on the spur of the moment. The learned trial Judge was of the view that the accused has no intention to commit murder and further the learned trial Judge was of the view that the conduct of the accused shows that he took Madinaben for treatment by admitting her in Civil Hospital. The learned trial Judge has failed to consider the aspect i.e. the purpose for taking Madinaben by the appellant accused husband at the Hospital is from the initial stage the appellant accused was to disclose the fact that Madinaben had in her house poured kerosene at 10.30 A.M. and sustained burn injury and further that the Doctor in term has admitted that Madinaben was brought by her husband without police yadi. In our view, the order passed by the learned trial Judge acquitting the appellant accused under Section 302 of the I.P.C. for the reason that he has recorded is not found proper. In view of the evidence in the form of F.I.R., which was recorded immediately on the very day and in view of the dying declaration which was subsequently recorded by P.W.1 Executive Magistrate, motive is not necessary for convicting the accused and in the present case, as found from the complaint, the motive suggested was that the accused had intention to marry Mehrunnissa the neighbour and the prosecution has not brought such evidence. Even prosecution has not led evidence with regard to cruelty. However, as found from the evidence in the form of dying declaration and in the complaint, she was ill treated at the hands of accused. Section 300 defines murder, which we reproduce hereunder.

"300. Murder. - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of

causing death, or-

Secondly,- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly,- If it is done with the intention of causing bodily injury of and person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly,- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

31. The case will fall as per Fourth clause of Sec.300. In the present case, the act of pouring kerosene and thereafter igniting match stick shows that it is so imminently dangerous and in all probability will cause death or such bodily injury as is likely to cause death and committed such act without any excuse for incurring the risk of causing death or such injury. The reasoning for acquitting the accused was that there was no intention and the act committed by the accused was in heat of passion and on the spur of the moment and according to the learned trial Judge, there was no intention on the part of the accused to commit murder of Madinaben. In our view, in view of the act done by the accused on the day of the incident, the learned trial Judge was not right in convicting the accused for the offence under Section 304 Part II of the I.P.C. In our view, the reasoning for acquitting the accused for the offence under Sec.302 of I.P.C. is not proper and the prosecution has established that the act and the offence that has been committed by the accused is under Section 302 of the I.P.C.

32. As discussed above and on close scrutiny of the entire evidence and while examining the judgment under challenge we are of the view that the order passed by the learned trial Judge acquitting the accused from the offence punishable under Section 302 of the I.P.C. is not proper and accordingly the Appeal filed by the accused being Criminal Appeal No.502/98 for seeking acquittal from the offence punishable under Section 304 Part II of the I.P.C. deserves to be dismissed and the accused is ordered to be convicted for the offence under

Section 302 of the I.P.C. Accordingly the Appeal filed by the State being Criminal Appeal No.542/98 is allowed. As we have accepted the prosecution case that the accused has committed murder of his wife, the order passed by the learned trial Judge convicting the accused for the offence under Section 304 Part II of the I.P.C. deserves to be modified and we convict the accused for the offence punishable under Section 302 of the I.P.C.

33. Accordingly Criminal Appeal No.502/98 is dismissed and the Criminal Appeal No.542/98 is allowed. The conviction and sentence recorded by the learned Addl. City Sessions Judge, Court No.11, Ahmedabad City in Sessions Case No.180/97 dated 3.4.98 against the accused Mohammed Ismail Alias Haji Abdul Kadar Sheikh for the offence under Section 304 Part II of I.P.C. is set aside and the accused Mohammed Ismail Alias Haji Abdul Kadar Sheikh is convicted for the offence punishable under Section 302 of I.P.C. and he is sentenced to undergo R.I. for life. The accused is also ordered to pay a fine of Rs.1000/-- in default to suffer further R.I. for six months. Rest of the order dated 3.4.98 passed by the learned Addl. City Sessions Judge, Court No.11, Ahmedabad City in Sessions Case No.180/97 is maintained.

(D.K.Trivedi,J)

arg (H.H.Mehta,J)